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91-1857

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1991

PATRICK AND SONYA MCBRIDE,
Petitioners,

v.

CLAYTON YEUTTER, DWIGHT SEWELL,
AND STEVE TAYLOR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI AFTER JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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May 14, 1992

QUESTIONS PRESENTED

The Secretary of Agriculture is authorized under the Consolidated Farm and Rural Development Act (CFRDA), 7 U.S.C. §§ 1921-1996 to make loans to family farmers who are "unable to obtain sufficient credit elsewhere to finance [their] actual needs at reasonable rates." 7 U.S.C. § 1983(a). In 1978 congress amended CRFDA by enacting 7 U.S.C. § 1981(a). This provision enables the Farmers Home Administration (FmHA) to defer payments due to FmHA from farmers who are temporarily unable to make payments due to financial circumstances beyond their control. Without authorization to defer payments the FmHA would either foreclose on the property or demand that the farmer "voluntarily convey" the property to FmHA for a release of liability. From 1978 until 1983 FmHA did not implement or provide notice to farmers of § 1981(a) before demanding voluntary conveyances from farmers or commencing foreclosure proceedings.

As a result of this inaction by FmHA, the United States District Court For the District of North Dakota issued a Nationwide Preliminary Injunction against the Secretary of Agriculture and the Farmers' Home Administration. Coleman v. Block, 580 F.Supp. 192 (D.N.D. 1983), 580 F.Supp. 194 (D.N.D. 1984). The injunction ordered the Farmers' Home Administration to provide notice of its loan deferral program, See 7 U.S.C. § 1981(a) before taking adverse action against family farmers. Subsequently congress codified the Coleman injunctive provisions by passing the Agricultural Credit Act of 1987 (Pub.L.No. 100-233, § 1 et seq., 101 Stat. 1568 (1988)).

By order of the District Court of North Dakota, the Secretary of Agriculture and officials of the Farmers' Home Administration were found in contempt of court for actions taken against the McBrides and damages were awarded to the plaintiffs as compensation for emotional distress caused by the contemptuous actions and economic losses experienced by the McBrides. The

Eighth Circuit Court of Appeals upheld the finding of contempt but vacated the award of emotional distress damages and the compensatory payment. The government has initiated administrative proceedings to collect the balance due of $131,143.04. No action has been taken regarding the collection proceedings pending the final outcome of this litigation. The questions presented by this case are:

1. Whether damages for emotional distress caused by the breach of an injunction are compensable in civil contempt proceedings.

2. Whether, when the government breaches an injunction and causes a farmer to be unable to pay loans to the government because it failed to notify the farmer of programs designed to assist the farmer to pay these loans, this conduct by the Executive Branch is a compensable damage of a breach of the duty to provide such notice.

3. Whether an order in a civil contempt action which in substance bars the government from collecting a debt is itself barred by the Doctrine of Sovereign Immunity.

PARTIES TO THE PROCEEDING

Patrick McBride, Sonya McBride, Clayton Yeutter, Secretary of Agriculture, Dwight Sewell, State Director of the Farmers Home Administration in Maine, Steve Taylor, County Supervisor of the Farmers Home Administration in Maine, were parties in the proceeding below.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

No. _____

PATRICK MCBRIDE AND SONYA MCBRIDE,

Petitioners

V.

CLAYTON YEUTTER, DWIGHT SEWELL, AND STEVE TAYLOR,

Respondents

PETITION FOR A WRIT OF CERTIORARI AFTER JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Patrick McBride and Sonya McBride, by and through their attorneys petition for a Writ of Certiorari to review the judgment of the Eighth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 955 F.2d 571 and is reprinted in the appendix hereto, p. 20a, *infra*.

The memorandum decision of the United States District Court for the Southwestern Division District of North Dakota (VanSickle, D.J.) has not been reported. It is reprinted in the appendix hereto, p. 1a, *infra*.

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on January 30, 1992. See p. 20a-45a, *infra*. Request for Rehearing En Banc was filed on February 11, 1992. The denial for rehearing en banc was filed on March 18, 1992. See p. 47a, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Relevant provisions of Article III, §2, of the Constitution of the United States are reproduced at p. 46a, *infra*.

STATEMENT OF THE CASE

A. Factual History

Patrick and Sonya McBride owned and operated a medium size family farm in Norridgewock, Maine from 1975 through February 21, 1984. The McBrides obtained a loan from Skowhegan Savings Bank (The Bank) and the Farmers Home Administration (FmHA) to finance the real estate purchase and to construct and equip their poultry barn.

The McBrides, along with their two minor children, successfully operated their farm through the Spring of 1981. In 1981 the broiler segment of Maine's poultry business collapsed and the McBrides were unable to grow broilers. Without any farm income they fell behind on payments to FmHA and The Bank. Through the McBrides concerted efforts they resumed growing poultry on their farm in February of 1983 and thus revived their farm operation and farm income. See tt. v. 1, p. 79.

The McBrides' FmHA County Supervisor was Steve Taylor. In 1982 Taylor advised the McBrides to allow the bank to foreclose on their property. He assured the McBrides that FmHA would pick up the bank's mortgage note during the foreclosure process and work with the McBrides. The McBrides followed Taylor's advice. See tt. v. 1, p. 75. McBride v. Lyng, No. A1-83-47-09, slip op. at 6 (D.N.D. Jan. 4, 1989) (hereinafter "Memorandum and Order").

In early 1984 the McBrides were informed by another farmer that FmHA did not intend to assist the McBrides in restructuring their loans. See tt. v. 1, pp. 86-87. Specifically, Taylor had told a friend of the McBrides that McBride would be "off his farm and on the street in 30 days." McBride v. Coleman, 955 F.2d 571, 578 ftn. 3, (8th Cir. 1992). The McBrides met with Taylor on February 16, 1984. See tt. v. 1, pp. 87-91. During this meeting Taylor did not discuss utilizing loan deferral provisions to restructure the McBrides' loan. Taylor informed the McBrides that they could convey their property to FmHA in exchange for a full release from FmHA or incur the liability for any deficiency not satisfied by the foreclosure proceeds. After meeting with Taylor the McBrides called Sewell who was the Maine State FmHA Director. Sewell's advice echoed that of Taylor's.

On November 14, 1983 the District Court of North Dakota issued a preliminary injunction prohibiting FmHA from taking specific actions against FmHA farmer borrowers without first providing to the farmers notice of the loan deferral provisions contained in 7 U.S.C. § 1981(a). This injunction became permanent on February 17, 1984, 580 F.Supp. 194 (Dist. Ct. N.D. 1984). Neither Taylor nor Sewell complied with the terms of the District Court Injunction. Because Taylor and Sewell demanded a voluntary conveyance without providing the requisite notices regarding loan deferral they violated the injunction in Coleman v. Block, 580 F.Supp. 192 (D.N.D. 1983), 580 F.Supp. 194 (D.N.D. 1984).

B. The Proceedings In This Case

On April 25, 1986, the McBrides filed their Motion for Order to Show Cause why the defendants should not be held in contempt of court. In their motion the McBrides sought pecuniary damages for the lost value of their farm and mental and emotional suffering as well as, "...an order...estopping FmHA from collecting the remainder of plaintiffs' debt owed to FmHA."

The hearing in this case took place during October 25th through the 28th, 1988. At no time during pre-trial proceedings or during the trial did the defendants object to plaintiffs' claim for emotional damages. During the contempt hearing, both the plaintiffs and defendants presented expert testimony regarding the causation and extent of plaintiffs' emotional harm as it related to the defendants' contemptuous conduct. The plaintiffs presented the testimony of Dr. Scott Hoch, a Clinical Psychologist licensed to practice psychology in the State of Maine. See Plaintiff's Exhibit 570, tt. v. 3, p. 550. Defendants presented the testimony of Dr. John Ordway. See Defendants' Exhibit 648, curriculum vitae of Dr. John Ordway, and tt. v. 4, pp. 761-762. Dr. John Ordway is a Psychiatrist who has been in private practice since 1955 and began practicing as a psychoanalyst beginning in 1966. See tt. v. 4, p. 762, l. 16-18.

Dr. Hoch and Dr. Ordway both reached the same diagnosis and same conclusion regarding causation and harm. Dr. Hoch diagnosed the McBrides as suffering from an adjustment disorder with mixed emotional features. See tt. v. 3, p. 542. He further testified that the cause of the McBrides' emotional disorder was the defendants' conduct. See tt. v. 3, p. 544, l. 7-11. Dr. Ordway also diagnosed the McBrides as suffering from adjustment disorder with mixed emotional features. See tt. v. 4, p. 771, l. 20-22. Dr. Ordway also determined that the cause of the McBrides' emotional difficulties was the contemptuous actions of the defendants, Sewell and Taylor. See tt. v. 4, p. 789, l. 23-25, p. 790, l. 1-17.

The McBrides presented testimony and evidence establishing the economic harm caused by the defendants' conduct. If Defendant Taylor had complied with the injunction and informed the McBrides of the loan deferral provisions, the McBrides would have paid off the bank mortgage with funds provided by Sonya McBride's mother. See Memorandum and Order p. 13a, *infra*. See tt. v. 1, p. 95, l. 15-25 and p. 96, l. 1-3. The McBrides then would have been in a position to work with FmHA and to continue making payments on their loan to FmHA.

Roger Knauf, a banker with commercial loan experience, testified that the McBrides had the ability to make payments on their outstanding loans to FmHA as of February, 1984. See tt. v. 2, pp. 332-336. His opinion was based upon the McBrides revived farming operation during the period of 1983 through the contempt in 1984.

Charlie Wallace was the General Manager of Dorothy Egg Farms. Dorothy Egg Farms was placing poultry on the McBrides' farm during the period of 1983 through the contempt of 1984. See Memorandum and Order p. 8a, *infra*. Mr. Wallace testified that had the McBrides kept their farm he would have been placing birds on their farm as of the date of his testimony on October 26, 1988. See tt. v. 2, p. 348, l. 8-24. He rated the McBrides as excellent growers with excellent facilities. See tt. v. 2, p. 346, l. 1-5.

The defendants alleged that their conduct in relation to the McBrides was not in contempt of the Court's order. Defendants further alleged that no harm was caused by their conduct because the bank foreclosed and FmHA attended the foreclosure sale.

After a four day hearing, the District Court found defendants Taylor, Sewell and the Secretary of Agriculture in contempt of the Court's injunction. This finding of contempt was affirmed by the Eighth Circuit Court of Appeals. McBride v. Coleman, 955 F.2d 571, 576 (8th Cir.1992). The Eighth Circuit then vacated the award of monetary damages. The Eighth Circuit vacated the award of emotional distress damages stating that:

> "We do not believe civil contempt to be an appropriate vehicle for awarding damages for emotional distress." McBride at 577.

It then vacated the order of economic damages based on a factual distinction after fully discussing the issue of sovereign immunity and determining that it had:

> "grave doubt that the contempt power can be carried as far as it has been carried against the United States in the present litigation." McBride v. Coleman, 955 F.2d 571, 576, 577 (8th Cir.1992).

The Eighth Circuit then remanded this case to the District Court for further consideration on the issue of attorney's fees and costs.

The government initiated administrative proceedings distinct from this case to collect $131,143.04 from the McBrides. No action has been taken in the administrative proceedings pending the final outcome of this case.

REASONS FOR GRANTING THE WRIT

I.

The Federal Judiciary must maintain its inherent authority to enforce compliance with its lawful orders by granting remedial relief for all damages flowing from defendants' contemptuous conduct.

The Eighth Circuit held that plaintiffs could not obtain damages for emotional distress when pursuing their remedies to redress the defendants' contempt of court. In one broad stroke the Eighth Circuit imposed artificial restraints on the Federal Judiciary, implemented limitations on plaintiffs' remedies in contempt actions and ignored the holdings of this court.

In McComb v. Jackson Hill Paper, 336 U.S. 187, 193 (1948), this Court noted in its holding: "The measure of the court's power in civil contempt proceedings is determined by the requirement of full remedial relief." In the case at bar, the defendants' contempt caused the McBrides to lose their home and farm where they were raising their children and earning their livelihood. To a lay person it is evident that the McBrides would be emotionally harmed as a result of losing their home, farm and livelihood. The McBrides emotional damage was verified by both the plaintiffs' and the defendants' expert witnesses. Plaintiffs' expert witness, Dr. Hoch, diagnosed the McBrides as suffering from an adjustment disorder with mixed emotional features. He further testified that the cause of the McBrides' emotional disorder was the defendants' conduct. See tt. v. 3, pp. 542, 544. Defendants' expert witness Dr. Ordway also concluded that the McBrides were suffering from an adjustment disorder with mixed emotional features. See tt. v. 4, p. 771, l. 20-22. Dr. Ordway also testified that the McBrides' emotional difficulties were caused by the contemptuous actions of defendants', Sewell and Taylor. See tt. v. 4, p. 789, l. 23-25, p. 790, l. 1-17.

The Eighth Circuit spoke of the problems of proof and assessment of damages regarding emotional distress. McBride at 577. In this case the proof was clear on the record and undisputed. Vacating the award for emotional distress damages without precedent or analysis imposes artificial restraints on the judiciary. Within the jurisdiction of the Eighth Circuit, plaintiffs pursuing their remedies for contempt of court can not seek emotional distress damages.

This arbitrary holding ignores the constitutional guarantees provided to plaintiffs and those similarly situated to have disputes involving the United States Government fairly decided by an impartial, neutral and co-equal judiciary. The Eighth Circuit decision ignores precedent requiring courts to award damages when proven.

Article III, § 2 of the United States Constitution states:

> "The Judicial Power shall extend to all Cases in Law and Equity, arising under this constitution,...to controversies to which the United States shall be a party..."

The Federal Judiciary has equitable power to impose compensatory fines when the court determines that defendants have committed a contempt of court. In the instant case the defendants' contempt forced the McBrides out of their home and off from their farm. The defendants breach of the Court's Order also caused the McBrides to suffer significant emotional distress.

It has long been held by many courts that damages must be awarded when proven. In Vuitton et Fils S. A. v. Carousel Handbags, 592 F.2d 126, 130 (1979), the court held:

> "The District Court is not free to exercise its discretion and withhold an order in civil contempt awarding damages, to the extent they are established." Yanish v. Barber, 232 F.2d 939, 947 (9th Cir. 1956); McGoff v. Rapone, 78 F.R.D. 8, 30 (E.D.Pa.1978); Thompson v. Johnson, 410 F.Supp. 633, 643 (E.D.Pa.1976), aff'd, 556 F.2d 568 (3rd Cir. 1977). Cf. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191, 69 S.Ct. 497, 93 L.Ed. 599 (1948).

A Fortiori, the Eighth Circuit Court of Appeals can not arbitrarily vacate proven damages.

Granted, in many cases involving business litigation such as Vuitton, emotional distress damages will not be an issue. But if the Eighth Circuit order arbitrarily vacating a judgment for proven damages is allowed to stand, then other remedies for plaintiffs can just as easily fall by the wayside. Simultaneously, the power of the judiciary over those who stand before it becomes increasingly limited due to the artificial restraints being self imposed by the Eighth Circuit. When a remedy designed to compensate plaintiffs for defendants' contempt of court is struck down, the court is less able to protect future beneficiaries of its orders and less able to enforce compliance with its own orders.

This Court must act now to enforce the judiciary's inherent authority and protect plaintiffs' remedies by making it clear that when parties are in contempt of lawful court orders all compensatory damages that flow from that contempt shall be awarded. It is urged that this court vacate the order of the Eighth Circuit and reinstate the District Court order awarding emotional distress damages to the McBrides.

II.

The government failed to provide the McBrides notice of the loan deferral provisions in 7 U.S.C. § 1981(a) and thereby forced the McBrides into a position where they could not repay their loans to FmHA. This conduct by the executive branch is a breach of the duty to notify and should be remedied by awarding damages for the amount of the outstanding loans.

The Eighth Circuit Court of Appeals vacated the order of economic damages in the amount of $131,143.04 awarded to the McBrides. The court accepted the governments' contentions that the damages did not flow from a violation of the Coleman Injunction. The Court noted:

> "This is crystal clear from the courts' statement that it was awarding the McBrides damages of $131,143.04 resulting from the defendants 'unjustified failure to forgive the balance of the debt upon the McBrides offer to convey...' memorandum and order at 17. This statement posits the existence of a duty to forgive the balance of the McBrides' debt--a duty that is no way to be found in the Coleman Injunction that could only arise from conduct or undertakings not covered by that injunction."

The duty imposed by the Coleman Injunction was to inform the McBrides of the loan deferral provisions contained in 7 U.S.C. § 1981(a). The focus of 7 U.S.C. § 1981(a) was to provide farmers who experienced a loss of income due to circumstances beyond their control and who had obtained ongoing farm income, to obtain a deferral on their payments for a period of time and then restructure their debts to enable the farmers to resume making payments on their loans to FmHA. Allison v. Block, 723 F.2d 631, 633, 634 (8th Cir. 1983).

Because FmHA did not follow the guidelines set forth by the Eighth Circuit in Allison, the Coleman Injunction was granted. This injunction required government agents employed by FmHA to provide notice of the loan deferral provisions available through § 1981(a) to farmer borrowers before taking adverse action against the farmer borrowers. Coleman v. Block, 580 F.Supp. 192 (D.N.D. 1983), 580 F.Supp. 194 (D.N.D. 1984). The duty is not to forgive the debt but rather to provide notice of the loan deferral provisions to farmer borrowers to enable them to pay their loans to FmHA.

In the instant case the defendants were found in contempt of court because they did not provide the requisite notices before taking adverse actions against the McBrides. Because the government took these adverse actions without the requisite notices, the McBrides were not able to pay their loan to the government. It is clear based upon a review of the evidence presented by the McBrides that had they been provided the requisite notices of loan deferral they would have been eligible for deferral and would have been able to pay their loans to the government.

The McBrides presented the testimony of Charlie Wallace who was placing poultry on the McBrides' farm during the period of 1983 through 1984. Mr. Wallace testified that had the McBrides not lost their farm he would have been placing poultry on their farm as of the date of the trial. See Memorandum and Order p. 8a,*infra*. See tt. v. 2, p. 348, l. 8-24. The McBrides also presented the testimony of Roger Knauf who has 22 years banking experience. Mr. Knauf testified that the McBrides had the financial ability to make payments on their loan to FmHA at the time of the contempt. The District Court found that the McBrides had between forty and fifty thousand dollars available from Sonya McBride's

mother to pay off the bank mortgage. See Memorandum and Order p. 13a, *infra*. Patrick McBride testified that had he been aware of the loan deferral provisions, he would have paid the bank loan and utilized the deferral provisions. See tt. v. 1, p. 95, l. 15-25 and p. 96, l. 1-3.

The district court showed great restraint in its order of damages. FmHA violated the injunction by failing to provide notice of the deferral provisions to the McBrides when agents of FmHA demanded a voluntary conveyance of the McBrides' home and farm. Plaintiffs' testimony and evidence establishes that if the McBrides had been aware of the loan deferral provisions, they would have been able to make payments on their loan to the Farmer's Home Administration, loans that amounted to $131,143.04. Additionally, they would have been able to pay their necessary operating expenditures. By awarding the amount of money the McBrides owed to FmHA in the form of compensatory damages the McBrides have been made whole for the harm directly caused by the defendants' contempt. The district court did not extend the McBrides' remedies to encompass future lost earnings and other economic harm. It granted a limited award designed to compensate the McBrides for the defendants' contempt in failing to notify the McBrides of the loan deferral provisions that would have enabled them to pay off their debt to FmHA.

The Eighth Circuit mispoke when it alleged that the remedy awarded for economic harm was based upon a duty of the government to forgive the debt. The duty was to comply with the injunction and provide notice of the deferral provisions. The remedy was to order compensatory damages in the amount equal to the debt. It is a limited remedy equal to the harm caused by the violation of that duty. This Court should encourage all courts to carefully craft remedies designed to compensate for direct harm caused by contemptuous actions and no more. Such remedies enforce the authority of the court without punishing the parties before it.

III.

Sovereign immunity does not preclude the Federal Judiciary from issuing an equitable order that in effect prohibits the executive branch from collecting a debt. To rule otherwise will erode the constitutional system of separation of powers and weaken the doctrine of separate but co-equal branches of government.

The award of $131,143.04 equaled the amount of money the McBrides owed the government and in effect was an order prohibiting the government from collecting the debt owed to the McBrides. The Eighth Circuit discussed whether or not sovereign immunity included an award of compensatory damages against the government in a contempt motion. The court noted,

> "It does strike us as being a dubious proposition that by filing a contempt motion a claimant can be positioned to recover an unlimited amount of compensatory damages from the United States without being bound by the strictures of either the Tucker Act or the Federal Tort Claims Act, which are expressed (but carefully limited) waivers by the United States of its sovereign immunity with respect to contract and tort claims." McBride, at 576.

The court then attempted to sidestep the issue by claiming that the McBrides failed to prove their economic harm despite the overwhelming evidence.

First and foremost this decision regarding sovereign immunity is in conflict with the Seventh Circuit, Nelson v. Steiner, 279 F.2d 944, 948 (7th Cir.1960). In Nelson the district court found IRS officials in contempt of a lengthy injunction which proscribed the actions the IRS could take against defendant Steiner. The district court found Nelson and another IRS employee in contempt of the court's order and awarded damages in the amount of $400.00 against each defendant. The Eighth Circuit

conveniently ignored the Nelson holding. Nowhere in their decision is that case referred to despite being included in plaintiffs' brief and having been mentioned by the Eighth Circuit in the related case of Hartman v. Lyng, 884 F.2d 1103 (8th Cir.1989).

In their Motion for Contempt the McBrides sought economic damages and "...an order...estopping FmHA from collecting the remainder of plaintiffs' debt owed to FmHA." By ordering a compensatory fine in the amount of the debt due, the court was exercising the least possible power adequate to the end proposed to remedy the harm caused by the defendants' conduct. The limitation on the court's equity powers was noted in Anderson v. Dunn, 6 Wheat. 204, 231 (1821) and as recently as the court's decision in Spallone v. United States, 493 U.S. 265, 276 (1990). The court's order in McBride in effect barred the government from collecting the debt and no more.

In Spallone, this court noted that courts have inherent power to enforce compliance with their lawful orders through civil contempt (quoting Shillitani v. United States, 384 U.S. 364, 370 (1966)). If this statement of law is to have any continuing meaning, then this court should find that sovereign immunity does not preclude an award for damages that in substance prevents the government from collecting a debt. To do otherwise will allow the executive branch of the government to ignore and defy lawful order of the judiciary and thus effectively erode both the authority of the judiciary and the constitutional separation of powers.

CONCLUSION

If the Eighth Circuit decision in McBride is left to stand it will be precedent utilized by defendants throughout the country to impose limitations on plaintiffs' remedies in Motions for Contempt and other actions. The McBride decision will be utilized by the executive branch to further curtail the existing inherent authority of the judiciary. To some this may seem appropriate in these times. This Court must remember that precedent withstands

the winds of time. When the inherent authority of the judicial branch is chiseled down at the bequest of the executive branch, it is not easily regenerated. This Court should act now to enforce its authority and to delineate the authority of the entire Federal Judiciary by granting this Writ and carefully analyzing the questions raised.

Respectfully submitted,

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May 14, 1992

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Dwight Coleman, et at, Plaintiffs,	]	
vs.	]	Civil No. A1-83-43
Richard Lyng, Secretary, U.S. Dept. of Agriculture, Defendants.	]	

MOTION BY PATRICK AND SONYA MCBRIDE
TO FIND CONTEMPT

Civil No. A1-83-47-09

MEMORANDUM AND ORDER

This motion to find contempt was originally filed on April 25, 1986, and is directed against the following:

a) Richard Lyng, U.S. Secretary of Agriculture, in his official capacity;
b) United States Department of Agriculture;
c) Charles W. Shuman;
d) David Marshall;
e) Dwight Sewell;
f) Steve Taylor.

Preliminary hearing on the motion was had on January 13, 1987, in Bismarck, North Dakota. Final hearing was had on October 25, 26, and 27, 1988, in Bangor, Maine.

I. FACTS

In Maine, poultry ("broiler") farming developed as a factory-like operation. Young chicks were furnished by a poultry processor, raised by a farmer, then returned to the processor for processing. The farmer kept the young chicks fed, watered, and protected from disease in a poultry "barn" -- a specialty building of one or more levels -- until they reached processing size and age. The processor supplied the farmer with feed for the chicks, and also paid the farmer a fee computed on a per chicken-per month basis. This method allowed a farmer to operate successfully on small acreage and with a relatively stable monthly income.

In 1975 and 1975, young Patrick McBride ("McBride") and his wife, Sonya, undertook steps to get into the business of poultry farming in Maine. They were well-equipped for the business, as Patrick had experience in construction and poultry processing, Sonya had experience in book-keeping, and both grew up in small, rural communities.

One of the first steps the McBrides took to start their business was to find a suitable farm. About 60 miles west of Bangor, near Skowhegan, Maine, they found a house and 53 acres of land. The house was well-constructed, and had water and electricity, but the McBrides needed financing to buy it. They also needed financing for construction of a chicken barn.

McBride began construction, laying out a steel building about 61 feet wide and 183 feet long, which, with three levels inside, would give him the space he needed. He also planned out and selected the necessary temperature and ventilation controls, electrical circuitry, necessary suspended and movable feeders and water facilities, and cleaning facilities. His plans, with some changes, were approved by the local FmHA county agent for an estimated $94,000.00 construction loan and a $29,000.00 operating loan for equipment. The FmHA wanted local bank

participation, however, so McBride went to Skowhegan Savings Bank ("the Bank") and received a $45,000.00 purchase commitment to be secured by a first mortgage on the realty. The loans as finally granted were:

1) July 10, 1975 first realty mortgage to Skowhegan Savings Bank for $40,000.00 at 9% per annum;

2) July 10, 1975 second realty mortgage to FmHA for $94,000.00 at 5% per annum subject to an authority to alter the interest rate charged;

As completed, the chicken barn had a cost of $112,500.00 and the entire unit had an appraised market value of $140,000.00.

As further security, the McBrides also executed the usual security agreement on chattels and crops (Form FHA 440-4), covering all farm and other equipment and specifically the bulk bins, feeders, waterers, tractor, and standby generator, plus all accounts insurable and intangibles arising out of the poultry operation. FmHA took further security in assignment of proceeds from the sale of products (Form FHA 441-8) which assignment reflected a payment schedule of $150.00 and $111.00 or $261.00 per week.

3) An operating loan of $29,000.00 at 8 3/4% per annum dated September 29, 1975, payable after the first payment at the rate of $4256.00 per year for seven years.

Things worked along until early 1981 when the poultry industry in Maine collapsed. Many of the processors either closed down or went into bankruptcy, leaving the McBrides with no chickens to contract, and thus, no way to garner income from the

limited-use chicken barn. The Bank and the FmHA put their loans on hold, while FmHA personnel, the farmers, the bankers and others sought alternatives to the defunct broiler business.

Matters stood that way throughout the remainder of 1981. The Bank repeatedly granted three-month stays of enforcement of its rights; and the FmHA, over the signature of Beatrice S. Kierow, County Supervisor, suspended the assignment of proceeds held by the FmHA in March of 1981.

On August 8, 1981, Steven H. Taylor was promoted to County Supervisor of the Skowhegan FmHA county office. He remained there until July 9, 1984, when he was transferred to the FmHA office in Bangor. Whatever his qualifications were at the time of his advancement, it is clear from subsequent events that from 1982 through 1984 he failed to demonstrate skills in interpersonal relations. This period of time was critical because it was when the FmHA had to restructure or call in its loans, balancing its primary duty of assistance to farmers against its secondary duty of protecting its assets.

Taylor very soon created animosity and stifled communication between himself and a substantial number of FmHA borrowers. This is exemplified in the contrast between the McBrides' relations with Taylor on March 1, 1984 (the day of the Bank's first mortgage foreclosure sale), and the McBrides' relations with the Bank's vice president, Lionel Lachapelle, on that same day.

Lachapelle informed the McBrides in a firm yet sympathetic letter of June 4, 1982 that it was necessary to proceed with foreclosure. Through the foreclosure and ultimate sale Lachapelle had at all times been willing to listen to the McBrides' concerns, considering possible alternatives with them in a relaxed atmosphere, yet firmly and compassionately keeping to his previously determined and authorized course. As a result, to the

end of the trial the McBrides respected him, and expressed their admiration of him.

In contrast, Taylor lost control of the situation in the second meeting with McBride on June 29, 1982. Taylor, in his efforts to assert FmHA's claim for a horse shed built against the chicken barn after the FmHA mortgage, lost his ability to communicate with the McBrides, and never again could regain it.

During 1981 the Bank, the FmHA, Taylor, and others interested in the poultry business let the loans slide while they tried to find a general solution to the problem of the defunct broiler industry. At a March 10, 1982 meeting, with Taylor and Marshall of FmHA present, the Bank discussed the mortgages of three chicken farmers -- Ed Clark, Larry Stanhope and McBride -- and left the accounts under the control of Vice President Lachapelle. On June 4, 1982, Lachapelle began his collection, and if necessary, foreclosure proceeding, by certified letter to the McBrides. The date of receipt is not decipherable, but the McBrides state that they had not received the letter by June 11, 1982, the day when a meeting was held at the McBrides' home at their request. Those present along with the McBrides were David Marshall, Chief of Farmer Programs, Maine FmHA; Dwight Sewell, State Director, Maine FmHA; and Taylor. During the meeting, a wide range of possible solutions and programs for resolving the FmHA claims were discussed. These included:

a) sale by the borrower;
b) sale of a portion of the place;
c) voluntary conveyance with release of liability;
d) FmHA foreclosure;
e) risk of the Bank's foreclosure of its prior lien; and
f) protection of at least the home through money made available by Sonya McBride's mother.

McBride asserted that at the meeting Sewell said, "As long as you derive any type of agricultural living from you farm you can stay here till hell freezes over." Sewell emphatically denies such a statement. However, given the personality of McBride as reflected in the report of Dr. John Ordway, the missions of the FmHA program, and the relaxed atmosphere of the meeting, I find it more likely so than not so that Sewell and Marshall tried to convince McBride that there were other solutions to his financial crisis, that if he could qualify the FmHA would help him save his farm or at least his home, that everyone understood how much the home meant to the family, and that there was a good chance that the McBrides had money available to cover the bank mortgage if that would save the home. (Ex. 571.)

The next meeting took place on June 29, 1982. The McBrides saw Taylor in his office. This, I find, was the meeting where Taylor lost control of the situation. He describes the meeting as revolving around a suggestion by the McBrides that they try to sell the home and convey the rest of the property to the FmHA in return for a general release. The McBrides, on the other hand, describe the meeting as an argumentative, heated exchange dominated by an arrogant Taylor who refused to let the McBrides salvage even the after-built horse shed on the premises. The McBrides were so upset that they called Sewell to protest Taylor's language and conduct, and asked to work with Sewell instead.

At this time or soon after, Sewell must have realized that Taylor needed direction and control. At least two other farmers had had similar difficulty with Taylor, giving Sewell some indication that something was wrong. Larry Stanhope was furious because before June of 1981 Taylor had told him that he could remain on his farm for a month or two, then Taylor would "kick [his] ass off the farm." Thereafter, Stanhope refused to work with Taylor and made his settlement with Sewell. Ed and Irislea Clark, the other farmers, felt Taylor's only concern was to get rid of them and get on to the next account. They told Sewell they couldn't work with Taylor.

Despite these clear signals of trouble between Taylor and the defaulting chicken farmers, Sewell forced the McBrides to work through Taylor.

On July 22, 1982 the McBrides went to Taylor and told him that the Bank was going to proceed with its foreclosure. Taylor told them to request that the foreclosure proceed, that FmHA could purchase the mortgage and work something out with the McBrides. Taylor denies giving the McBrides this advice. However, McBride went directly from Taylor's office to the bank and told Lachapelle that he had come from Taylor, where he was instructed to let the Bank foreclose and then he could work out something with the FmHA.

An action to foreclose the Bank mortgage was begun October 13, 1982. Judgment of Foreclosure and Sale was entered January 14, 1983. Public sale was held March 1, 1984, at which time the FmHA as junior lienholder bought the land for $51,875.37, consisting of the following:

a)	$36,794.67	principal;
b)	13,987.70	interest;
c)	1,092.00	attorneys fees and costs; and
d)	1.00	to override the Bank's bid
	$51,875.37	TOTAL

Had the McBrides been permitted to close the Bank claim immediately after the foreclosure action was begun, i.e. December 7, 1982, the Bank's claim could have been liquidated for $42,323.08. (Exhibit 565.) However, all meaningful communication between the McBrides and both Taylor and Sewell ceased after the McBrides, following Taylor's orders and relying

on his general assurance to help them, told the Bank to proceed with the foreclosure.

In February of 1983, McBride brought chickens into his barn under a contract with Dorothy Egg Farms. He processed three flocks through the barn between February 1983 and May 1984.

In May 1983 (about the time he must have learned that McBride had chickens back in the barn) Taylor recommended to his superiors that the FmHA should let the bank foreclosure proceed and then acquire the property. This decision, i.e. to take advantage of the foreclosure proceeding and cut out McBride, was never communicated to McBride.

On November 9, 1983, Taylor visited the farmhouse. He found both vehicles in the yard, the dog barking, and the washing machine running. No one came to the door, however. Without checking the out-buildings, Taylor summarily concluded that no one would come to the door, and he left. He returned some time later, found like circumstances, and reached the same conclusion. In fact, the McBrides were out in the chicken barn; and although they had not specifically told Taylor that they again had chickens in the barn, Taylor knew this, and the McBrides were aware that Taylor knew this fact.

On November 23, 1983, Sewell began a program of notice to field officers regarding the November 14, 1983 order in Coleman v. Block -- including the portion dealing with voluntary conveyances.

In December of 1983, Taylor visited the farm with Marshall. This time the McBrides were not at home, and Taylor and Marshall checked the barn. They observed that it was cleaned out, i.e. between flocks.

On February 2, 1984, Taylor received his direction to bid at the Bank's foreclosure sale on March 1, 1984; and to bid up to the FmHA's appraised value of $75,000.00.

On February 16, 1984, the McBrides came to see Taylor and were "very upset." Carl Vandermer had seen McBride earlier that day and told him that Taylor had just told Vandermer that he, McBride, would be "off his farm and on the street in 30 days."

Taylor alleges that at the February 16 conference he advised McBride that if McBride could provide sufficient documentation to prove that he could pay the FmHA account, FmHA might accept a refinancing plan to include the Bank loan. Taylor further alleges that he told McBride that they (the McBrides) should consider voluntarily conveying the property to the FmHA in return for a release of the entire account. After some cross talk throughout that day and the next few days, Taylor told the McBrides that they could either voluntarily convey the property to the FmHA and get a release of their debt, or be foreclosed and owe any unliquidated balance. Again McBride called Sewell in attempt to work with someone other than Taylor. Again he was told that he had to work with Taylor, and his only options were foreclosure or voluntary conveyance and debt forgiveness.

On February 21, 1984, after Taylor had prepared the voluntary conveyance papers, he called the McBrides to come in and sign them.

Sometime during the period after judgment of foreclosure and before foreclosure sale, Taylor filled out FmHA Form No. 912 Attachment A. (Ex. 536). In the form, he recited that McBride was not acting in good faith, and not demonstrating sincerity and honesty in meeting his commitments to FmHA in that he: a) was not willing to accept supervision; b) had lost the

poultry business; c) was not willing to liquidate under supervision; and d) was noncooperative.

With respect to these charges, there is evidence that McBride had been responsible by repairing and cleaning the house after an inside fire; had repeatedly tried to work with Taylor; and had been persistent in his decision to keep his poultry business alive, as exemplified by his rejection of a suggestion that he go into the cattle business -- a suggestion that Sewell admitted was not wise. McBride was in fact back in the broiler business, cooperating in the FmHA's plans to liquidate him by foreclosure and sale, and like several others, unable to get along with Taylor.

In the meantime, the FmHA's state office attitude, dependent principally or solely on Taylor's reports, is reflected in an interoffice note over the signature of Janice Kremin, State Loan Technician, dated March 4, 1985. (Ex. 547.) The note refers to the "Offer to Convey Security" (FmHA Form 465-4 -- ex. 517) with the words, "Here it is!"

The same day that Taylor called the McBrides to sign the voluntary conveyance papers, February 21, 1984, the McBrides came to Taylor's office and signed the papers. At that time, Taylor asserts that he gave the McBrides attachments numbered 1, 2, and 3 of the Pretermination Notice Program, and that the McBrides signed attachment 3 after Taylor had checked the blank consent to a voluntary conveyance. (Ex. 608, attachments 1, 2, and 3.) The McBrides state that they saw some papers in the office. They signed the blank statement 3; and also signed FmHA 465-4 Offer to Convey Security (a bill of Sale covering the business fixtures, and by implication, all other chattels), and FmHA 431-3 Household Financial Statement and Budget. (Ex. 516, 517, 518, and 519.) The McBrides have no recollection of attachment 2 and 3. They were given until May 1, 1984 -- the end of their current chicken flock program -- to vacate, and did so on May 1, 1984.

Taylor hand carried the instruments to the state office where the Offer to Convey Security was altered by the typing in of the language "Subject to good and marketable title to be vested in the Government." By letter of February 27, 1984, the title examiner for FmHA advised Taylor that because publication of the notice of sale had been completed by the time FmHA inquired as to a deed back from the McBrides, such a deed could not transfer clear title until after the sale process was completed. The reason given was that such a transfer created a possibility of a third party claim based on detrimental reliance on the notice of sale. (Ex. 629.)

Taylor immediately notified the McBrides that their offer to convey was rejected.

On July 2, 1984, the business fixtures were sold for $8990.00. On August 16, 1984, the real estate (53 acres and improvements less business fixtures) was sold for $60,000.00. The total from the sale was $68,990.00. McBride was not notified of the realty sale, and thus was denied a chance to bid.

At the hearing on January 13, 1987, the FmHA conceded that no notices were given except those to which the McBrides were exposed to on February 21, 1984, when the Offer to Convey and Bill of Sale were signed.

This action is brought by the plaintiffs against the defendants only in their official capacities. (P.8 transcript of January 13, 1987 hearing.)

II. DISCUSSION

The controlling law in this case is basically found in the Consolidated Farmers Home Administration Act of 1961, through the amendments of 1984 (7 U.S.C.); the Federal Regulations issued in compliance with that Act (7 C.F.R.); Coleman v. Block, Order Granting Temporary Injunction, filed November 14, 1983,

580 F. Supp. 192 (DND 1983); and the Permanent Injunction filed February 17, 1984.

For purposes of this case the critical language of the injunction is:

> A. The ... defendants ... are enjoined from ...
>
> (c) demanding voluntary conveyance by the plaintiffs or
>
> (d) repossessing chattels of the plaintiff or in any way proceeding against or depriving the plaintiffs of property in which the defendants have a security interest
>
> until the defendants shall have given ... at least 30 days notice ...

Coleman v. Block, 580 F. Supp. 192, 193-194 (DND Nov. 14, 1983) (identical language appearing in Coleman v. Block, 580 F. Supp. 194, 211 (DND Feb. 17, 1984)).

The notice provided for in both decisions covers such matters as alternative procedures, statement of reasons for action, and availability of review. Thus, actions taken or statements made before November 11, 1983 cannot be in violation of the injunction. However, the actions may be relevant as coloring or confirming actions taken or statements made after November 11, 1983.

This court finds that the only basis for finding a contempt against the Secretary of Agriculture in his official capacity is the doctrine of respondeat superior.

A finding of contempt against officers and employees of the Department of Agriculture, acting in their official capacity, does not put the Department itself in contempt. The Department

is an agency of the Government, not empowered to sue or to be sued in evasion of sovereign immunity. Westcott v. United States Dept. of Agriculture, 611 F. Supp. 351 (DC Neb. 1984); United States Department of Agriculture v. Hunter, 171 F.2d 793 (CA5 1949); North Dakota-Montana Wheat Growers' Ass'n v. United States, 66 F.2d 573 (CA8), cert.den., 291 U.S. 672 (1933).

Charles W. Shuman has not been shown to have committed a contempt and he is dismissed from the action.

I find that Steve Taylor, on or about June 29, 1982, began a program or policy of keeping the McBrides from taking any protective action in order that he might liquidate their farm operation and evict them from the premises.

I find that as a result of the representations and actions by Taylor and as to which Sewell knew or should have known, the McBrides reasonably believed that they would at the very least be able to reclaim such portions of the original farm as they could finance. I further find that Sewell and Taylor both represented to the McBrides that if they would satisfy the Bank's first mortgage, and voluntarily convey the premises to the FmHA, the balance of the FmHA debts would be forgiven, and the McBrides would be given a reasonable chance to reacquire the property or so much as they could afford, at its then market value.

I further find that the McBrides had available from Sonya McBride's mother a sum of between forty and fifty thousand dollars which could be used by the McBrides to pay off the first mortgage to the Bank, or to assist in a repurchase of the house or the farm at the time of its resale.

I find that subsequent to the filing of the preliminary injunction (Nov. 14, 1983), the final injunction (Feb. 17, 1984), and continuously through the judgement of foreclosure and sale by the Bank (March 1, 1984), Taylor and his supervisor, Sewell, failed to give the McBrides adequate and meaningful notice as required by the injunctions, and deprived the plaintiffs of property

in which the FmHA had only security, not a possessory, interest. I further find that the defendants demanded voluntary conveyance of the McBrides in violation of the injunction.[1/]

I also find that had the money which was available to the McBrides been used to clear the Bank's claim during the foreclosure proceeding, the McBrides would have saved about $10,000.00 of costs and interest, and that this saving was not effected because Taylor and Sewell directed McBride to let the foreclosure run its course.

I also find that in response to the demand for a voluntary conveyance, McBride executed an Offer to Convey Security (FmHA Form 465-4) which offer to convey security contained a commitment to remove all prior liens -- and at that time the McBrides had available to them sufficient monies to satisfy the only prior lien, the Bank loan. That upon receiving the offer to convey, Sewell had the terms of the offer altered by typing in an additional term (immediate marketable title) that the alteration was neither disclosed nor explained to the McBrides. That as so altered the offer to convey was rejected on the grounds that good and marketable title was not available. That Sewell admitted that good and marketable title was in fact received by the FmHA upon the completion of the sale which occurred two days after rejection of the offer. That the McBrides delivered to the FmHA, in compliance with the demand of Taylor, a bill of sale to certain

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[1/] Sewell testified that although he had served in Senior administrative positions in Washington, D.C. and elsewhere, and although he was well acquainted with the federal regulations and with the forms and procedures specifically developed to handle voluntary conveyance, and although he recognized that the phrase "voluntary conveyance" was a phrase of art developed as part of the jargon of the FmHA regulations, he could not grasp the meaning of the prohibition against demanding voluntary conveyances. See 7 C.F.R. § 1955-10 (a),(b),(c),(d),(e), and (f).

chicken barn equipment, thus waiving their remedial rights against wrongful possession by the security holder -- that despite the rejection of the offer to convey, the FmHA claimed the bill of sale and exercised ownership privileges over the equipment.

I find that Taylor, to further discourage the McBrides from attempting to reclaim all or a part of the premises, sold the 50,000 square foot chicken barn for salvage, thereby collecting for the FmHA a mere pittance of its true value. In fact, he collected less than salvage value of the truss rafters alone, which were used to construct the building.[2/]

This conduct by Taylor and Sewell not only violated the injunction, it violated elemental principles of contract law.[3/] The debtor-creditor relationship is a contractual relationship. KMC Co., Inc. v. Irving Trust Co., 757 F.2d 752 (CA6 1985).

> The relationship between debtor and creditor is in large part contractual in nature. [Footnote] The parties' agreement is subject to the application of a contractual requirement of good faith. [Footnote] This good faith requirement may be required by the Uniform Commercial Code, or it may be implied by general contract law. [Footnote] Either way, the concept of good faith in the

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[2/] This 50,000 square foot building was constructed in 1975 at a cost of just over $100,000.00. It was well-lighted, had a high-pitched roof, truss rafters and an open span. .It was located in the rural area of Maine, where the annual snowfall is approximately 42". Such a building had immeasurable potential uses, yet Taylor justified its destruction for salvage by classifying it on March 27, 1984 as "not suitable." (Ex. 531.)

[3/] Sewell testified to the effect that he could not be expected to inform himself of and oversee the work of the county agents because he was too busy.

> performance of a contract creates boundaries beyond which the creditor must not stray. [footnote]

Note, Lender Liability: Breach of Good Faith in Lending and Related Theories, 64 N.D.L. Rev. 273, 274 (1988).

In the situation in this case, the implied covenant of good faith and fair dealing required that when Taylor, acting for the FmHA, decided to liquidate and evict the McBrides, the FmHA has a duty to so advise the McBrides that they could utilize the review process, or find other financing to the extent possible. See KMC, 757 F.2d at 759.

Further, the imposition of a demand for a "voluntary conveyance" constitutes the tort of duress. See Note, Lender Liability, supra, at 306.

In order to establish duress, the debtor must show the following elements:

1. involuntary acquiescence to the terms of the contract imposed by the lender;
2. circumstances permitting no alternatives; and
3. those circumstances being the result of coercive acts on the part of the lender.

There is no doubt that the McBrides have shown all elements. The FmHA dictated the terms of its lending contracts.[4/]
Both Taylor and Sewell made repeated demands on the McBrides to convey the property and accept forgiveness of the balance, or else refuse and be liable for the balance -- and to make the choice

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[4/] See Form FHA 427-1 ME, Real Estate Mortgage for Maine (ex. 619); Form FHA 441-1, Promissory Note (ex. 505); Form FHA 440-4, Security Agreement (ex. 657); and Form FHA 465-4, Offer to Convey Security (ex. 517).

with an outstanding promise that something would be worked out if a "voluntary conveyance" was made. Taylor and Sewell clearly committed the tort of duress.

I find further that the McBrides, although traumatized by the destruction of the chicken raising business by factors beyond their control, were further and severely traumatized by the misconduct of Taylor and Sewell, and have suffered damages as follows:

a) unjustified failure to forgive the balance of the debt upon the McBrides' offer to convey, with the capacity to convey on the terms demanded by Sewell and Taylor, resulting in damages of $131,143.04 plus any interest that may have accrued from October 27, 1988 to the date of settlement by FmHA;

b) extended emotional distress, inconvenience, and embarrassment resulting in damages of $50,000.00; (See Ex.659.)

c) attorneys fees and costs to be established by counsel through the drafting, filing, and service upon the defendants, of an affidavit of costs and expenses.

I do not allow damages for loss of income because on all the evidence, I conclude that the McBrides would have suffered greater total losses had they not been driven to finding supplemental income sources.

THEREFORE, IT IS ORDERED:

1) THAT THE CLAIM AGAINST THE U.S. DEPARTMENT OF AGRICULTURE, AS SUCH, IS DISMISSED ON THE MERITS;

2) THAT THE CLAIM AGAINST CHARLES W. SHUMAN IS DISMISSED ON THE MERITS;

3) THAT THE CLAIM AGAINST DAVID MARSHALL IS DISMISSED ON THE MERITS;

4) THAT THE PLAINTIFFS HAVE JUDGMENT AGAINST THE U.S. SECRETARY OF AGRICULTURE IN HIS OFFICIAL CAPACITY, UNDER DOCTRINE OF RESPONDEAT SUPERIOR, AND HAVE JUDGMENT AGAINST DWIGHT SEWELL AND STEVE TAYLOR IN THEIR OFFICIAL CAPACITIES AS FOLLOWS:

   A) FINANCIAL DAMAGES OF $131,143.04, PLUS AN AMOUNT EQUAL TO ANY INTEREST THAT MAY HAVE ACCRUED ON THE FmHA ACCOUNTS AGAINST THE PLAINTIFFS FROM OCTOBER 27, 1988 TO THE DATE OF SETTLEMENT BY FmHA, WITH INTEREST THEREON AT THE LAWFUL RATE FROM OCTOBER 27, 1988;

   B) PERSONAL DAMAGES OF $50,000.00, PLUS INTEREST THEREON AT THE LAWFUL RATE FROM OCTOBER 27, 1988 UNTIL PAID.

Let judgment be entered accordingly.

Dated this 4 day of January, 1988.

/s/ Bruce M. VanSickle
U.S. District Court Judge

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 89-5135

Patrick McBride and Sonya McBride,	*	
	*	
Appellees,	*	
	*	
v.	*	
	*	
Dwight Coleman, Lester Crowsheart, Sharon Crowsheart, Russel Folmer, Anna Mae Folmer, George Hatfield, June Hatfield, Donna McCabe, Diane McCabe, on behalf of themselves and others similarly situated. Gary A. Barrett, Rosemary K. Barrett, Richard L. Harmon, Betty J. Harmon, Larry L. Robertson, Nancy K. Robertson, Ross Wade and Maureen Wade,	*	
	*	
v.	*	
	*	
Clayton Yeutter, Secretary of Agriculture, Charles W. Shuman, Administrator of the Farmers Home Administration, Ralph W. Leet, State Director of the	*	Appeal from the United States District Court for the District of North Dakota

Farmers Home Administration; Harold T. Aasmundstad, Glen W. Binegar, Allen G. Drege, Dennis W. Larson, Odell O. Ottmar, and Joseph J. Schneider, as District Directors of the Farmers Home Administration of North Dakota; Samuel Delvo, Lorace Hakanson, Larry Leier, Charles Schaefer and James Well as County Supervisors of the Farmers Home Administration in North Dakota, David Marshall, Dwight Sewell and Steve Taylor,

Appellants.

Submitted: May 18, 1990

Filed: January 30, 1992

Before LAY,* Chief Judge, BOWMAN, and WOLLMAN, Circuit Judges.

*The Honorable Donald P. Lay was Chief Judge of the United States Court of Appeals for the Eighth Circuit at the time this case was submitted and took senior status on January 7, 1992, before the opinion was filed.

BOWMAN, Circuit Judge.

The Secretary of Agriculture and two employees of the Department of Agriculture appeal an order of the District Court finding them in civil contempt and awarding compensatory damages, attorney fees, and costs. We affirm in part and reverse in part.

I.

This proceeding is ancillary to a nationwide class action, Coleman v. Block, which challenged the Farmers Home Administration's (FmHA) loan liquidation foreclosure procedures on statutory and constitutional grounds.[1] The District Court's nationwide preliminary injunction in Coleman v. Block was filed on November 14, 1983 and required the FmHA, inter alia, to give at least thirty days notice of its loan deferral program, see 7 U.S.C. § 1981a (1988), before demanding voluntary conveyance by a farmer or depriving a farmer of property in which the agency has a security interest. Coleman v. Block, 580 F. Supp. 192, 193-94 (D.N.D. 1983). The injunction was made permanent in Coleman v. Block, 580 F. Supp. 194, 210-12 (D.N.D. 1984), and was vacated as moot (because of the enactment of the Agricultural Credit Act of 1987) in Coleman v. Lyng, 864 F. 2d 604 (8th Cir. 1988), cert. denied, 493 U.S. 953 (1989).

During 1973 and 1974, Patrick and Sonya McBride decided to enter the poultry farming business in Maine. They located a suitable farm and began planning for construction of a broiler barn. In order to finance these plans, the McBrides went

[1]The factual and procedural history of the Coleman litigation is set forth in Coleman v. Lyng, 864 F.2d 604 (8th Cir. 1988), cert. denied, 493 U.S. 953 (1989).

to Skowhegan Savings Bank (the Bank) and received a $40,000.00 real estate loan that was secured by a first mortgage on the realty. The FmHA also agreed to provide the McBrides with a $94,000.00 construction loan and a $29,000.00 operating loan for equipment. The FmHA received a second mortgage on the realty.[2] When completed, the farm contained such amenities as a swimming pool and a horse barn.

In 1981, the poultry business in Maine collapsed. Although the McBrides ceased making payments on their loans, neither the Bank nor the FmHA foreclosed immediately. Ultimately, by certified letter date June 4, 1982, the Bank informed the McBrides that it was necessary to proceed with foreclosure. Although the record indicates that Sonya McBride's mother had a sum of money sufficient to pay off the mortgage to the Bank, and offered it to the McBrides for that purpose, the McBrides did not avail themselves of her offer, at least in part because of certain assurances, which we will come to momentarily, given them by one of the defendants.

The couple arranged a meeting at their home on June 11, 1982 with various FmHA officials, including Dwight Sewell, the State Director of the FmHA in Maine, and Steve Taylor, the McBrides' FmHA county agent. While those present discussed a number of possible options, ultimately nothing was resolved. The next meeting took place in Taylor's office on June 29, 1982. When again nothing was resolved, the McBrides contacted Sewell to discuss their financial situation. Sewell directed them to work with Taylor.

The McBrides met with Taylor a third time on July 22, 1982 and notified him that the Bank intended to proceed with the foreclosure. While the parties dispute the events of the meeting,

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[2]The FmHA also obtained the only security interest in the equipment purchased with the operating loan.

the McBrides claim that Taylor advised them to allow the Bank to continue with the foreclosure procedure and assured them that the FmHA would purchase the mortgage and thereafter would work with them. The McBrides say that based on these assurances they declined to use the money then available from Sonya McBride's mother to pay off the Bank mortgage. In any event, after this meeting the McBrides instructed the Bank to proceed with foreclosure.

The Bank filed an action for foreclosure on October 13, 1982 and obtained a judgment of foreclosure on January 14, 1983, at which time the statutory one-year period of redemption began to run. In February 1983, with Taylor's knowledge, the McBrides began growing replacement chickens on their farm for Dorothy Egg Farms.

As previously noted, the District Court's nationwide preliminary injunction in Coleman v. Block issued on November 14, 1983. Coleman v. Block, 580 F. Supp. 192 (D.N.D. 1983). On November 23, 1983, Sewell began a program of notice to field officers regarding that order. The injunction was made permanent on February 17, 1984.

The McBrides again visited Taylor on February 16, 1984. At this meeting, Taylor explained to the McBrides that they could either voluntarily convey the property to the FmHA and extinguish their debt or be foreclosed and owe any unliquidated balance. He also mentioned the possibility of refinancing upon proof of the McBrides' arrangement with Dorothy Egg Farms. The McBrides contacted Sewell, who confirmed these suggestions and referred them back to Taylor.

Shortly thereafter, the McBrides telephoned Taylor and directed him to prepare the conveyance documents. Taylor did so, and, on February 21, 1984, the McBrides executed an offer for a

voluntary conveyance to the FmHA.[3] Taylor says that a pretermination notice package prepared in response to the Coleman v. Block injunction was included with the conveyance documents; the McBrides say they have no recollection of any such notice.

After the documents were signed, the state FmHA office added a notation to the effect that the FmHA would accept the McBrides' offer of voluntary conveyance if it received marketable title. On or about February 27, 1984, Taylor informed the McBrides that their offer was rejected as the impending judicial sale of their property prevented the FmHA from receiving marketable title. The Bank's foreclosure sale was held March 1, 1984, at which time the FmHA as junior lienholder bought the land for $51,875.37. On July 2, 1984, the FmHA sold the business fixtures for $8,990.00 and the real estate for $60,000.00.

On April 25, 1986, the McBrides filed a motion to find contempt against the United States Department of Agriculture, the Secretary of Agriculture, and various FmHA officials, including Taylor and Sewell. Following an evidentiary hearing, the District Court, in a memorandum and order filed January 4, 1989, concluded that Taylor and Swell had violated the Coleman v. Block injunction by failing to give the McBrides adequate and meaningful notice of the loan deferral program before depriving them of property in which the FmHA had only a security, not a possessory, interest and before demanding voluntary conveyance. It further found that Secretary of Agriculture to be in contempt based upon a respondeat superior theory.[4]

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[3]The McBrides signed a conveyance document and deed to effectuate the real estate transfer and a bill of sale to convey the equipment.

[4]The District Court dismissed the charges against the Department of Agriculture and the other defendants.

In reaching its decision, the District Court recognized that actions that occurred prior to the issuance of its preliminary injunction in Coleman could not be in violation of the injunction. It also took the view, however, that such "actions may be relevant as coloring or confirming actions taken or statements made after [the issuance of the preliminary injunction]." McBride v. Lyng, No. A1-83-47-09, slip op. at 12 (D.N.D. Jan.4, 1989) (hereinafter "Memorandum and Order"). Upon examining the conduct of Taylor and Sewell both before and after the issuance of the preliminary injunction in Coleman, the court concluded that they not only had violated the injunction, but "elemental principles of contract law" as well. Memorandum and Order at 15. In addition, the court also found that in demanding that the McBrides make a voluntary conveyance Taylor and Sewell had "clearly committed the tort of duress." Memorandum and Order at 16.

Turning to the question of damages, the court found that the McBrides, "although traumatized by the destruction of the chicken raising business by factors beyond their control, were further and severely traumatized by the misconduct of Taylor and Sewell." Memorandum and Order at 16-17. The court then proceeded to award damages of $131,143.04 (plus interest) based on the "unjustified failure to forgive the balance of the debt upon the McBrides' offer to convey." Memorandum and Order at 17. An additional $50,000.00 was awarded for the McBrides' "extended emotional distress, inconvenience, and embarrassment," Memorandum and Order at 17, along with attorneys fees and costs in an amount yet to be determined.

On appeal to this Court the government's main points, buttressed by various supporting arguments, are: (1) the District Court exceeded its jurisdiction when it considered the McBrides' contract and tort claims, as these claims were not based on the injunction, which was the predicate for the McBrides' contempt motion; (2) even if Taylor and Sewell violated the injunction the

McBrides are not entitled to any relief; and (3) the District Court erred in entering its finding of contempt.[5]

II.

We first address the issue of whether the District Court erred in finding that the actions of Taylor and Sewell[6] were

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[5]In its brief and also in a post-argument submission filed November 18, 1991, the government suggests that because the Coleman litigation has ended and the Coleman injunction has been vacated, see Coleman, 864 F. 2d at 612, this case is moot and the contempt finding should be vacated. We disagree. Although our opinion in Coleman ordering the injunction vacated was announced on December 28, 1988 and the contempt finding in the present case was filed a week later, on January 4, 1989, the petition for rehearing in Coleman was not denied until February 1, 1989, and our mandate did not issue until after that had occurred. The District Court thereafter, in keeping with our mandate, dismissed the Coleman case. See Coleman, Civil No. A1-83-47 (D.N.D. Feb. 21, 1989). Thus the injunction was still in place when the District Court entered the contempt finding, and the contumacious conduct occurred during the time the injunction was in force. In these circumstances, we do not believe the present case is moot. If the injunction no longer had been in force when the District Court entered it contempt finding, a different case would be presented, and we express no opinion as to the jurisdictional question in such a case.

[6]The litigants have not suggested any distinctions among the three parties the District Court found in contempt. Although it is not clear that the Secretary of Agriculture can be held in contempt on a theory of respondeat superior, "'[q]uestions not raised, briefed or argued will ordinarily be given no consideration by an appellate court.'" Jasperson v. Purolator Courier Corp., 765 F. 2d 736, 741 (8th Cir. 1985) (citations omitted).

contumacious of the Coleman v. Block injunction. The nationwide preliminary injunction in Coleman v. Block issued on November 14, 1983. We quote the relevant language thereof:

> 3. That the defendants, their agents, subordinates, and employees, are enjoined until further order of this court from
>
> . . .
>
> (c) Demanding voluntary conveyance by the plaintiffs, or
>
> (d) Repossessing chattels of the plaintiffs or in any way proceeding against or depriving the plaintiffs of property in which the defendants have a security interest,
>
> until defendants shall have given any plaintiffs against whom the defendants propose to proceed at least 30 days notice [of the FmHA loan deferral program].

Coleman v. Block, 580 F. Supp at 193-94.[7] The District Court found that Taylor and Sewell violated the injunction by failing to give the McBrides adequate and meaningful notice of their rights before depriving them of property in which the FmHA had only a security, not a possessory, interest, and before demanding from them voluntary conveyance. Memorandum and Order at 13. Because we conclude that these findings are not clearly erroneous, see Fed. R. Civ. P. 52(a), the District Court's contempt citation was not an abuse of discretion. See Hartman v. Lyng, 884 F. 2d

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[7]Nearly identical language appears in the permanent injunction issued February 17, 1984. Coleman v. Block, 580 F. Supp. at 211.

1103, 1106 (8th Cir. 1989) (reviewing a contempt holding by an abuse of discretion standard); see also Davis v. Bowen, 894 F. 2d 271, 272 (8th Cir. 1989) ("Our review of the denial of a contempt motion is limited to determining whether the district court abused its discretion."), cert. denied, 110 S. Ct. 1922 (1990).

On February 16, 1984, the McBrides met with Taylor. Taylor informed the McBrides at that meeting that they could either convey the farm to the FmHA and get a release of their debt or be foreclosed and owe any unliquidated balance. As Taylor gave the McBrides these "limited options of selling [their] land or facing foreclosure," Hartman, 884 F.2d at 1105, we would agree that his actions "constituted a demand [for voluntary conveyance]." Hartman, 884 F.2d at 1105. Although the record shows that the parties also discussed the possibility of refinancing based upon the McBrides' dealings with Dorothy Egg Farms, there is some dispute as to the precise language used, and we cannot say the District Court was clearly erroneous in finding that such refinancing was never a real possibility.

Based upon this record, the District Court did not commit clear error in finding that Taylor and Sewell failed to comply with the notice provisions of the Coleman injunction and thus failed to give the McBrides adequate notice of their rights. The contempt finding therefore was factually supported and was not an abuse of discretion.

III.

Although the District Court's contempt finding was not an abuse of discretion, we cannot sustain the court's award of damages. The government argues strenuously that sovereign immunity precludes an award against the government of compensatory damages, indistinguishable from those that might be awarded in a contract or tort action, in a civil contempt proceeding. This is a weighty argument, and we regard it very seriously. It does strike us as being a dubious proposition that by filing a contempt motion a

claimant can be positioned to recover an unlimited amount of compensatory damages from the United States without being bound by the strictures of either the Tucker Act or the Federal Tort Claims Act, which are express (but carefully limited) waivers by the Untied States of its sovereign immunity with respect to contract and tort claims. Absent an express waiver of sovereign immunity, money awards cannot be imposed against the United States. See United States v. Mitchell, 463 U.S. 206, 212 (1983); Block v. North Dakota, 461 U.S. 273, 280 (1983). See also Barry v. Bowen, 884 F.2d 442, 443-44 (9th Cir. 1989) (holding that district court's award of monetary sanctions for contempt violated the sovereign immunity of the United States, but also reversing on other grounds). There does not appear to be any express wavier of sovereign immunity applicable to this case.[8] We therefore have grave doubts that the contempt power can be carried as far as it has been carried against the United States in the present litigation.

We need not decide that question, whoever, for as is apparent from the language of the District Court's opinion, the damages that it awarded did not flow from the defendants' violation of the notice provision of the Coleman injunction. Instead, as the government contends, the damages the court awarded flow from conduct that antedated the Coleman injunction or that otherwise is not encompassed by that injunction. This is crystal clear from the court's statement that it was awarding the McBrides damages of $131,143.04 resulting from the defendants' "unjustified failure to forgive the balance of the debt upon the McBrides' offer to convey . . . ." Memorandum and Order at 17.

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[8]We note that the Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 1568 (1987), the enactment of which mooted the Coleman litigation, see Coleman, 864 F.2d at 612, does not even provide an implied private right of action for farmer-borrowers, see Zajac v. Federal Land Bank of St. Paul, 909 F.2d 1181, 1183 (8th Cir. 1990), much less any sort of express waiver of the sovereign immunity of the United States.

This statement posits the existence of a duty to forgive the balance of the McBrides' debt--a duty that is nowhere to be found in the Coleman injunction and that could only arise from conduct or undertakings not covered by that injunction. Indeed, in reviewing the record we are struck by the McBrides' total failure to show a causal connection between the defendants' failure to give timely notice as required by the injunction and the damages alleged. As a factual matter, they have not shown that the course of events would have played out any differently had the required notice been given in a timely manner. For example, the McBrides have made no factual showing that if the required notice had been given in a timely manner they would have applied for the loan deferral program, nor have they made even an attempt to show that if they had applied for the program they would have qualified for it and received a loan deferral.

The District Court understandably and properly was troubled by what it found to be misconduct by Taylor and Sewell in their course of dealing with the McBrides. In a related action by the McBrides against Taylor and Sewell another court has called the defendants' conduct "deceitful," a characterization with which we have no quarrel. See McBride v. Taylor, 924 F.2d 386, 387 (1st Cir. 1991) (rejecting the McBrides' Bivens-type claims, based on the same facts as the present case, on the ground that Taylor and Sewell had not violated any clearly established constitutional right and thus were entitled to qualified immunity). Although it is quite tempting to use the defendants' violation of the Coleman injunction as a reason for compensating injuries that actually flow from other wrongs, "judicial discretion must not yield to such impulses." Barry, 884 F.2d at 444. As the McBrides have failed to show that their losses were caused by the defendants' failure to give the notice required by the Coleman injunction--rather than by other circumstances and conduct that do not implicate the Coleman injunction, and therefore cannot be a basis for relief in this contempt action--the award of damages is clear error and is not sustainable. See Hartman, 884 F.2d at 1106 ("The district court's finding with respect to damages is reversible only if clear error.").

A special word is in order regarding the award of $50,000.00 for emotional distress. Even assuming arguendo a causal relationship between the violation of the injunction and the harm suffered, we do not believe civil contempt to be an appropriate vehicle for awarding damages for emotional distress, see In re Walters, 868 F.2d 665, 670 (4th Cir. 1989). But see Powell v. Ward, 487 F. Supp. 917 (S.D.N.Y. 1980), aff'd as modified, 643 F.2d 924 (2nd Cir.), cert. denied, 454 U.S. 832 (1981). The problems of proof, assessment, and appropriate compensation attendant to awarding damages for emotional distress are troublesome enough in the ordinary tort case, and should not be imported into civil contempt proceedings. Although in some circumstances an award of damages to a party injured by the violation of an injunction may be appropriate, see, e.g., Welch v. Spangler, 939 F.2d 570, 572-73 (8th Cir. 1991); In re Tetracycline Cases, 927 F.2d 411, 413 (8th Cir. 1991), the contempt power is not to be used as a comprehensive devise for redressing private injuries, and it does not encompass redress for injuries of this sort.

Our disposition of the damages issue makes it unnecessary for us to address the government's other arguments. In conclusion, the District Court's finding that a contempt occurred is affirmed, but the award of damages is reversed. The case is remanded to the District Court for further consideration of the issue of attorney fees and costs.

LAY, Chief Judge, concurring and dissenting.

I fully concur that the government was in contempt of the Coleman v. Block injunction, 580 F. Supp. 192 (D.N.D. 1983) (temporary injunction), 580 F. Supp. 194 (D.N.D. 1984) (permanent injunction), as set forth by the district judge. I also

agree that the government is not liable for money damages for emotional distress or for breach of contract.[1]

However, I respectfully disagree with the majority opinion in its denial of reparations to the McBrides in the amount of $131,143.04. This amount represents the deficiency owed by the McBrides to the FmHA as a direct result of the government's contumacious conduct in violation of the district court's injunction. I would also hold that the government may not set up the defense of sovereign immunity to avoid payment of such a compensatory sanction.

Reparations

In order to fully appreciate the government's role in causing the deficiency foreclosure and loss of the McBrides' farm it is necessary to understand the vindictive and punitive conduct of the government officials.[2]

The McBrides obtained an FmHA loan and began poultry farming in 1975. They farmed with apparent success for six years until a general collapse of the Maine poultry industry caused them

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[1]In their motion to hold the government in contempt the McBrides asked for pecuniary relief which would restore them to their status quo. Motion by Patrick McBride and Sonya McBride to Find Contempt at 4. They did not seek damages for breach of contract or any tort committed by the government. As noted below, the McBrides did seek these damages in a separate law suit not involved or related to the contempt motion filed in the district court.

[2]The First Circuit called the conduct of the government officials in this case "deceitful." See McBride v. Taylor, 924 F.2d 386, 387 (1st Cir. 1991).

to default on their loans. The court found that although the McBrides had a cooperative relationship with their private banker, they had difficulty working with Steve Taylor, the FmHA county supervisor. The district court, which had the opportunity to observe the witnesses, attributed these difficulties to Taylor's attitude. The court noted that two other farmers had registered complaints about Taylor, including one who stated that Taylor had vowed to "kick [the farmer's] ass off the farm." McBride v. Lyng, No. A1-834709, slip op. at 6 (D.N.D. Jan. 4, 1989).

Aside from Taylor's arrogant attitude, the district court found that Taylor encouraged the McBrides to allow foreclosure of their farm, promising that the FmHA would purchase the mortgage and work something out with them. Relying on Taylor's promise, the McBrides allowed the foreclosure proceedings to run their course, even though they could have paid off the bank mortgage by virtue of funds available from Mrs. McBride's mother. In allowing the foreclosure to take place, the McBrides incurred expenses of approximately $10,000 in costs of foreclosure and interest, expenses they could have avoided by paying off their loan. McBride v. Lyng, slip op. at 14.

Despite his assurances to the McBrides, Taylor had the FmHA purchase the mortgage with the intent to force the McBrides off their farm.[3] Sometime around February 18, 1984, Taylor informed the McBrides they must either convey their entire farm in exchange for a full release from FmHA, or face foreclosure and the liability for any deficiency not satisfied by the proceeds of the foreclosure sale. Taylor did not give the McBrides meaningful and adequate notice of their rights, including their right to establish eligibility for the loan deferral program, as

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[3]Taylor told a friend of the McBrides that McBride would be "off his farm and on the street in 30 days." McBride v. Lyng, slip op. at 8.

required by the Coleman v. Block temporary injunction filed November 14, 1983, and the permanent injunction filed February 17, 1984.

Although the McBrides signed voluntary conveyance papers on February 21, 1984, the FmHA rejected the conveyance several days later. Without the McBrides' knowledge, the FmHA had modified the conveyance papers to add the requirement of immediately marketable title, and the FmHA's counsel determined that the McBrides could not convey marketable title because the pending auction sale presented the possibility of a third-party claim in reliance on the advertised auction.[4] This sequence of events, engineered by Taylor, prevented the McBrides from satisfying the bank mortgage to clear title on the farm.

Thus, through manipulation and bad faith Taylor made sure that the McBrides were left with nothing. If the McBrides had not relied on Taylor's promises, they would have been able to preserve some portion of their home and farm. If they had been given an opportunity to clear their title, the McBrides could have conveyed the property and avoided the deficiency. More importantly, if Taylor had given the McBrides notice of the loan deferral program, they could have kept their farm and avoided any deficiency.

There can be little question that if the McBrides had been informed of the loan deferral program, qualified for the program, and received a loan deferral, they would not have been subject to the $131,143.04 deficiency. The majority speculates that the McBrides might not have applied or qualified for the loan deferral program. This assumption ignores the evidence that the McBrides had access to funds they could have used to satisfy the bank

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[4]Two days after it rejected the voluntary conveyance the FmHA did receive marketable title when it purchased the McBrides' farm at the auction.

mortgage if the FmHA would have deferred payment on the FmHA loans. Moreover, at the time the McBrides' farm was sold at auction, the Maine poultry industry had recovered to the extent that the McBrides had a contract with a poultry processor and were operating at fifty percent capacity. There is every reason to believe the McBrides would have been able to easily pay future loan payments to the FmHA. Furthermore, because the FmHA prevented the McBrides from having the opportunity to be considered for loan deferral, it should not be permitted to argue that the McBrides might not have applied or qualified for deferral.

I therefore must respectfully disagree with the majority's conclusion that the monies ordered restored to the McBrides in the amount of $131,143.04 did not flow directly from the government's violation of the Coleman v. Block injunction. The overwhelming weight of the evidence clearly supports the district court's specific finding to the contrary:

> [The] unjustified failure to forgive the balance of the debt upon the McBrides' offer to convey, with the capacity to convey on the terms demanded by Sewell and Taylor, result[ed] in damages of $131,143.04 plus any interest that may have accrued from October 27, 1988 to the date of settlement by FmHA....

McBride v. Lyng, slip op. at 17.

A district court is provided broad discretion in fashioning an appropriate remedy for contempt. See Hartman v. Lyng, 884 F.2d 1103, 1106 (8th Cir. 1989). "[A] compensatory sanction is not imposed to vindicate the court's authority or to punish the contemnor, but rather serves to make reparation to the injured party, restoring that party to the position it would have held had the court's order been obeyed." In re Grand Jury Subpoena of June 12, 1986, 690 F.Supp. 1451, 1453 (D. Md. 1988); see also Hutto v. Finney, 437 U.S. 678, 691 (1978) ("Civil contempt may

also be punished by a remedial fine, which compensates the party who won the injunction for the effects of his opponent's noncompliance."); United States v. United Mine Workers, 330 U.S. 258, 304 (1946); Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911); G. & C. Merriam Co. v. Webster Dictionary Co., 639 F.2d 29, 41 (1st Cir. 1980) ("It is well settled . . . that the court may, in a proceeding for civil contempt, impose the remedial punishment of a fine payable to an aggrieved litigant as compensation for the special damages he may have sustained by reason of the contumacious conduct of the offender.") (quoting Parker v. United States, 126 F.2d 370, 380 (1st Cir. 1942)); Latrobe Steel Co. v. United Steelworkers, 545 F.2d 1336, 1344 (3rd Cir. 1976) ("Remedial or compensatory [contempt] actions are essentially backward looking, seeking to compensate the complainant through the payment of money for damages caused by past acts of disobedience.").

We should not reverse the exercise of the district court's broad discretion in this area unless there has been a showing of clear abuse. As the Supreme Court has stated: "The measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief." McComb v. Jacksonville Paper Co., 336 U.S. 187, 193 (1949); see also Vuitton et Fils S.A. v. Carousel Handbags, 592 F.2d 126, 130 (2d Cir. 1979) (the party injured due to the violation of a court order by another is entitled to "be made whole for the harm he has suffered.").[5] By

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[5]In Manhattan Industries v. Sweater Bee By Banff, Ltd., 885 F.2d 1 (2d Cir. 1989), cert. denied, 110 S.Ct. 1447 (1990), the Second Circuit did not even require actual losses to be shown, but rather utilized the unjust enrichment theory of compensation. The court cited Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 455-56 (1932), for the proposition that "a civil contempt fine is not always dependent on a demonstration of 'actual pecuniary loss.'" 885 F.2d at 5. Relying upon Leman, the court held that compensatory relief may include "profits derived from the

denying them full remedial relief, the majority does a great injustice to the McBrides and condones the reprehensible actions of the FmHA.

Sovereign Immunity

I now turn to the question of whether, in a contempt proceeding, the sovereign immunity of the United States precludes the imposition of compensatory sanctions to a party injured as a result of government conduct violative of a court order.

Although disclaiming its need to decide this issue, the majority nevertheless sends a clear signal that it would uphold the government's defense of sovereign immunity. The cases cited on page 10 of its opinion, however, do not squarely address the issue here. The court in Barry v. Bowen, 884 F.2d 442, 443-44 (9th Cir. 1989), merely expressed doubt about its ability to assess damages against the government in a contempt proceeding.

I respectfully submit that the majority has overlooked provisions of the Administrative Procedure Act (APA) which expressly waive sovereign immunity in actions other than those

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contemnor from violation of a court order. Such profits are 'an equivalent or a substitute for legal damages,' when damages have not been shown, and are recoverable 'not by way of punishment but to insure full compensation to the party injured.'" Id. at 6 (quoting Leman, 284 U.S. at 456) (citations omitted); see also Broadview Chem. Corp. v. Loctite Corp., 311 F.Supp. 447 (D. Conn. 1970).

seeking money damages. 5 U.S.C. § 702 (1988).[6] Section 702 provides in relevant part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702.

Under section 702 of the APA, the federal courts maintain broad equitable power to remedy the actions of the United States

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[6]The government does not dispute the applicability of section 702 but urges that because monetary relief is sought here, it does not fall within the express waiver of section 702. Brief for Appellant at 27. I disagree. As will be discussed, infra, the Supreme Court has recognized the difference between money damages and the equitable restoration of monies. See Bowen v. Massachusetts, 487 U.S. 879 (1988). Where the action is for equitable relief and the restoration of monies expended, the express waiver in section 702 applies. In the present case, the plaintiffs received reparations from the district court in the form of monies paid or obligated under the deficiency judgment by reason of the secretary's violation of the Coleman v. Block injunction.

government which adversely affect private citizens. The APA was specifically amended by Congress in 1976 to "strengthen [the] accountability [of the government] by withdrawing the defense of sovereign immunity in actions seeking relief other than money damages . . . ." H.R. Rep. No. 1656, 94th Cong., 2d Sess. 4, reprinted in 1976 U.S.C.C.A.N. 6121, 6124. The House Judiciary Committee reasoned that just as the United States is treated the same as other landowners in actions to quiet title, "so too has the time now come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity." Id. at 9, 1976 U.S.C.C.A.N. at 6129. The House Report goes on to declare that "[o]nly if citizens are provided with access to judicial remedies against Government officials and agencies will we realize a government truly under the law." Id. at 10, 1976 U.S.C.C.A.N. at 6130.

In Bowen v. Massachusetts, 487 U.S. 879 (1988), the Supreme Court interpreted section 702 to permit equitable suits for specific relief in the form of money. See also Maryland Dep't of Human Resources v. Department of Health & Human Servs., 763 F.2d 1441 (D.C. Cir. 1985); cf. School Comm. v. Department of Educ., 471 U.S. 359 (1985) (order requiring reimbursement by town to parents for educational costs not an award of money damages). The Court distinguished money damages from monetary relief, stating that "the fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'. . . [S]pecific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.'" Bowen, 487 U.S. at 893, 895 (quoting D, Dobbs, Handbook on the Law of Remedies 135 (1973)).

There is no question "that the 1976 amendment to section 702 was intended to broaden the avenues for judicial review of agency action by eliminating the defense of sovereign immunity in cases covered by the amendment . . . ." See Bowen, 487 U.S. at

891-92. In the present case, the plaintiffs claim they have suffered a legal wrong because of agency action, and that they have been adversely affected and aggrieved by the agency action within the meaning of the relevant statute. The district court's finding of the defendant in contempt of court by reason of the injunction previously issued is a part and parcel of the original suit against the agency. See Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 452 (1932); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 445 (1911) (civil contempt proceedings are "tried as a part of the main cause."); Panther Pumps & Equipment Co. v. Hydrocraft, Inc., 566 F.2d 8, 17 n.6 (1977). I respectfully submit that section 702 is applicable under these circumstances.

Aside from the express waiver I find in section 702, I would alternatively hold that the doctrine of sovereign immunity cannot be used as a defense against the district court's compensatory sanction against the secretary in order to make the plaintiffs whole because "courts have inherent power to enforce compliance with their lawful orders through civil contempt." Spallone v. United States, 493 U.S. 265, 276 (1990) (quoting Shillitani v. United States, 384 U.S. 364, 370 (1966)); see also United States v. Trudell, 563 F.2d 889, 891 (8th Cir. 1977) ("It is widely recognized that a court has inherent authority to punish contemptuous behavior that obstructs the judicial process.").

Without question, the power of the judiciary to compel compliance with its orders extends to the executive branch. The Seventh Circuit, awarding costs and attorney fees to an injured party after finding the federal government in contempt, stated that "[t]he executive branch of government has no right to treat with impunity the valid orders of the judicial branch." Nelson v. Steiner, 279 F.2d 944, 948 (7th Cir. 1960). In Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987), the Supreme Court affirmed the inherent authority of the federal courts to initiate criminal contempt proceedings against an officer of the United States, acting in his official capacity. The Court observed that the federal courts' power to initiate contempt

proceedings is grounded on necessity: "The ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches." Id. at 796. The Court further stated that "[i]f the Judiciary were completely dependent on the Executive Branch to redress direct affronts to its authority, it would be powerless to protect itself if that Branch declined prosecution." Id. at 801.

If sovereign immunity can bar compensatory sanctions for contempt against the United States, the judiciary becomes completely dependent on the good graces of the executive branch for compliance with its orders. At least one circuit has rejected this position with respect to state sovereign immunity. Reasoning that "[t]he court's power to order [remedial] contempt fines . . . is ancillary to its power to order compliance with the law," the First Circuit rejected the State of Massachusetts' assertion of sovereign immunity against the imposition of compensatory sanctions to injured parties after finding the state in contempt. Fortin v. Commissioner of Mass. Dep't of Pub. Welfare, 692 F.2d 790, 797-98 (1st Cir. 1982). While there is concededly a fundamental difference in the grant of sovereign immunity to the states under the eleventh amendment and the immunity from damages afforded the federal government,[7] one legal commentator has concluded that "in substance [federal sovereign immunity doctrine] has developed as an almost exact counterpart of eleventh amendment-state sovereign immunity doctrines. In fact, the theory behind the doctrines of state and federal sovereign immunity is sufficiently similar that the reasoning of cases discussing federal sovereign immunity almost always carries over to eleventh

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[7]The debates over the eleventh amendment and the question of to what extent sovereignty was yielded to the federal government place perhaps a different shade on whether a state government might be liable for reparations in federal court in a contempt proceeding.

amendment cases . . . and vice versa." Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One, 126 U. Pa. L. Rev. 515, 517-18 (1978) (footnote omitted).

The Supreme Court has recognized that "[i]f a state agency refuses to adhere to a court order,a financial penalty may be the most effective means of insuring compliance." Hutto v. Finney, 437 U.S. 678, 691 (1978). The alternative struck the Court as much more intrusive upon sovereign rights: "The principles of federalism that inform the Eleventh Amendment doctrine surely do not require federal courts to enforce their decrees only by sending high state officials to jail." Id. This argument applies with equal force to the government's claim of sovereign immunity here.[8]

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[8]In recent decisions dealing with the government's sovereign immunity against monetary sanctions imposed under various rules of civil and appellate procedure, several circuit courts have condoned awards of attorney fees and costs against the federal government despite the absence of express waivers.

The Tenth Circuit rejected the government's sovereign immunity claim with respect to Rule 11 sanctions under the Equal Access to Justice Act, 28 U.S.C. § 2412 (1988). Adamson v. Bowen, 855 F.2d 668 (10th Cir. 1988). The court found its holding consistent with that, at a minimum, the United States should be held to the same standards in litigating as private parties." 855 F.2d at 672 (quoting H.R. Rep. No. 1418, 96th Cong., 2d Sess. 19, reprinted in 1980 U.S.C.C.A.N. 4984, 4998).

In Mattingly v. United States, 939 F.2d 816 (9th Cir. 1991), the Ninth Circuit also affirmed the imposition of Rule 11 sanctions against the United States over sovereign immunity objections. Cf. Schanen v. United States Dep't of Justice, 798 F.2d 348, 350 (9th Cir. 1986) (awarding a fugitive from justice and her lawyer attorney fees and costs related to the government's failure to defend diligently a FOIA action: "Since it was the

It would seriously erode our system of separation of powers if the executive branch was effectively immune from the judicial power. The federal courts must have the inherent authority to enforce executive branch compliance with judicial orders which serve to restore to the status quo a party injured as a direct result of the government's contumacious conduct. Otherwise, the judiciary would be powerless to impose the most effective remedy

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government's lack of diligence that prolonged these proceedings, justice demands that Schanen and Tillet be compensated for their expenses occasioned by the additional proceedings."). Although the Ninth Circuit had previously permitted a private party to recover attorney fees from the United States under Rule 11, United States v. Gavilan Joint Community College Dist., 849 F.2d 1246 (9th Cir. 1986, Mattingly upheld a $1,000 fine to be paid to the district court. The Ninth Circuit explicitly rejected the Equal Access to Justice Act theory relied upon by the Tenth Circuit, grounding its opinion instead on the Federal Rules of Civil Procedure, which "apply by their own force to all litigants before the court." 939 F.2d at 818. Because Congress authorized the promulgation of those rules, the Ninth Circuit reasoned, their application to the United States as a litigant cannot violate sovereign immunity. Id.; see also Joseph v. United States, 121 F.R.D. 406, 414 (D. Haw. 1988).

Similarly, the Ninth Circuit has upheld compensatory sanctions against the United States under Federal Rule of Civil Procedure 37(b), see United States v. National Medical Enters., 792 F.2d 906 (9th Cir. 1986); United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365, 1371 (9th Cir. 1980) (sanctions imposed against government attorney to deter "further disobedience of court orders.") (Rule 37(f) then prohibited the assessment of fees or costs against the United States itself), and the First Circuit has affirmed an award against United States under Federal Rule of Appellate Procedure 38, see In re Good Hope Indus., 886 F.2d 480 (1st Cir. 1989).

for ensuring compliance with its orders against the most frequent litigant in the federal courts.

This case involves a fundamental question relating to the inherent power of the federal judiciary as a co-equal branch of government. The power to use money sanctions as a means of reparation rests upon the fundamental premise that "[w]hat the chancellor may order, he may enforce . . . ." Hirschhorn, Where the Money is: Remedies to Finance Compliance with Structural Injunctions, 82 Mich. L. Rev. 1815, 1861 (1984); see also D. Dobbs, Handbook on the Law of Remedies 93.

I would vacate the award of the district court for $50,000 damages arising from emotional injury. I would affirm the monetary sanction in the sum of $131,143.04 against the United States. Since the majority disagrees, I must respectfully dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

ARTICLE III

§ 1. ...

§ 2. Jurisdiction

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;...to Controversies to which the United States shall be a Party;...

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 89-5135NDBI

Patrick McBride and Sonya McBride,	*	
Appellees,	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc
v.	*	
Clayton Yeutter, etc., et al,	*	
Appellants,	*	

The suggestion for rehearing en banc is denied. Chief Judge Arnold and Judge McMillian would grant the suggestion for rehearing en banc.

The petition for rehearing is also denied. Judge Lay would grant the petition for rehearing.

March 18, 1992

Order Entered at the Direction of the Court:

(MICHAEL E. GANS SIGNATURE)

Clerk, U.S. Court of Appeals, Eighth Circuit